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S MUTHU KUMAR & ORS

v.

LIM ENG KOK & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
NOOR AZIAN SHAARI JC
[SUIT NO: S7-23-27-2001]
20 MARCH 2006

C ***TORT:*** *Defamation - Publication of letter - Whether defamatory - Whether defendants proved improprieties on plaintiffs' part - Defence of justification and qualified privilege - Whether proved and made out by defendants - Plea of malice - Whether failed - Whether plaintiffs ought to be compensated - Defamation Act 1957, s. 8*

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The plaintiffs herein were claiming for general damages alleging that they were defamed by reason of the defendants' publication of a letter, indicating improprieties on the part of the plaintiffs in executing their functions as the Convenor and a Sub-Committee member of the Darts Section of the Royal Lake Club ('RLC') signing alcohol to the Darts Section Fund and taking coupons in numbers more than their entitlement. The defendants pleaded the defence of justification and qualified privilege.

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Held (dismissing plaintiff's claim):

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(1) The first and second plaintiffs had breached the RLC rule as Convenor and Sub-Committee Member of the Darts Section by signing liquor to the Darts Section Fund. Both the plaintiffs had 'abused their trusteeships as office bearers' by charging alcohol to the RLC in due breach of the RLC's policy. (para 18)

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(2) The defendants have proven the facts alleged in the letter as there were clear evidences that the two plaintiffs had signed for alcohol to the Darts Section Fund, an action that was forbidden by the Club rules. There was also ample evidence that the second plaintiff had taken more coupons for drinks than he was allowed. (para 22)

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(3) Since the defence of justification had been made out by the defendants, the letter was published on an occasion of qualified privilege. The defendants as members of the Club had the right to be concerned with the actions of the first and

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second plaintiffs as they pay RM5 per month to the Darts Section Fund and the Darts Section not only has this money, but also gets a certain amount annually from the RLC fund which was in fact derived from all members of the club. The defendants had a moral, social and legal duty to be concerned about the improprieties and rectify the deficiency and to discipline office bearers who had breached the rules of the RLC. The defendants had proved and made out the defence of justification and qualified privilege. (paras 23 & 27)

(4) Not an iota of evidence was led to prove malice. Therefore the plea of malice must fail. There was also no prove that the plaintiffs' reputation was injured and that they had suffered humiliation and ought to be compensated. (paras 29, 30 & 31)

Case(s) referred to:
Abdul Rahman Talib v. Seenivasagam & Anor [1966] 2 MLJ 78 ***(refd)***
Ayob Saud v. TS Sambanathamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***
Jaafar Shaari & Siti Jaafar Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 8
Rules of the High Court 1980, O. 35 r. 4(3)

For the 1st & 2nd plaintiffs - N Chandran (Raiza Zakaria with him); M/s Albar & Partners
For the 1st, 3rd-15th defendants - Dominic Puthucheary (Indran N Jeganathan with him); M/s SK Yeoh

Reported by Suhainah Wahiduddin

JUDGMENT

Noor Azian Shaari J:

[1] By the writ and statement of claims filed on 9 March 2001 the three (3) plaintiffs are claiming for general damages alleging that they were defamed by reason of the defendants' publication of a letter dated 7 February 2000.

[2] The defendants filed their statement of defence on 2 May 2001 and pleaded the defence of justification and qualified privilege.

[3] The plaintiffs in their reply asserted that the defendants were motivated by malice.

[4] Before the trial, the 3rd plaintiff withdrew his claim.

[5] For convenience, the relevant publication that is the cause of the whole matter in issue is reproduced below:

To: Mr. Somu
The Chairman
Darts Section
Royal Lake Club Date: 7th December 2000

Dear Sir

Re: **Darts Section**

We, the undersigned hereunder request that an investigation be commenced regarding *inter alia*, the following matters pertaining to the previous Convenor and two Sub-Committee members who, we are inclined to believe, had conducted the affairs of the section with impropriety. The following paragraphs will depict some of the said improprieties.

1.0 During the months of July and August, 2000 the Convenor and Sub-Committee members had consumed beverages during period other than club functions and charged these to the Section Fund. We believe that their abuse of trusteeship as office bearers may have occurred on other occasions beside the period indicated above. We hope that an audit can be conducted. For details of their abuses, please refer to Appendix A.

2.0 We believe the Convenor and Sub-Committee members have been regularly abusing the distribution of coupons for drinks at in-house functions. Our understanding is that at every Darts-In-House gathering, the section has been provided with 2 barrels of beers and 3 bottles of whisky which are equivalent to 275 drinks/coupons. We notice that all the in-house functions based on the total attendance there is perpetually a balance of drinks after giving each member three (3) free drinks. Please refer to Appendix B for further details, Ironically, the balance of the drinks has not benefited other sectional members except for a few cronies within their group.

Lastly, we stress that it is important that all office bearers be transparent and accountable to the members of the section in particulars and the club in general. Failure to correct these improprieties would lead to an unhealthy state of affairs.

We thank you in anticipation of your prompt intervention before the present situation deteriorates.

c.c. En. Rahim Ismail
The President
Royal Lake Club

Royal Lake Club

Darts Section Members 12.7.2000

No.	Name	Membership No:	Signature
1.	EK Lim	10292	Signed
2.	Erer Chan	8591	Signed
3.	Francis	9464	Signed
4.	Too	8572	Signed
5.	Jo Ong	10925	Signed
6.	Jimmy Yoa	9559	Signed
7.	Philo Yoa	9559	Signed
8.	Connie Ang	8299	Signed
9	AE Loh	6586	Signed
10.	Robert Newton	13279	Signed
11.	Peter Ang	8299	Signed
12.	Hasbullah	11646	Signed
13.	Gan Ching Lai	8614	Signed
14.	Prem Kumar	T6152	Signed
15.	V Santhana Krishnan	9573	Signed
16.	Joyce Leow	6855	Signed
17.	Jimmy Leow	6855	Signed
18.	Lee Chee Hin	4679	Signed

[6] The trial went on for five days with the plaintiffs' calling 8 witnesses. At the close of the plaintiffs' case the defendants elected not to adduce evidence and instead to submit no case to answer. I drew their attention to the fact that they are put to their election and "**that if they did not call evidence the case would stand or fall on the submission: ... Once a defendant in civil proceeding elects not to call evidence**, then all the

A evidence led by the Plaintiff must be assumed to be true" – per Gopal Sri Ram JCA in *Jaafar Shaari & Siti Jaafar Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 at p. 511. (emphasis added).

[7] I subsequently heard the plaintiffs' counsel submit first – B O. 35 r. 4(3) of the Rules of High Court 1980 followed by the defendants' counsel. The plaintiffs' counsel later replied.

[8] As a result of the election of the defendants as to no case to answer, I only have to consider the plaintiffs' evidence and the submissions of the parties. C

[9] By the statement of agreed facts dated 18 October 2004, the parties agreed to the following facts:

(1) Both plaintiffs were at the material times members of the Royal D Lake Club (RLC).

(2) The 1st to the 13th defendants and 15th defendants were members of the Darts Section of the RLC.

(3) All members of the RLC are bound by the "Constitutional E Rules & Bye Laws of the RLC".

(4) The letter of 7 December 2000 which is in issue was addressed to S. Somu, Chairman of Darts Section of the RLC and a copy sent to Rahim Ismail, the President of the Club. F

(5) The words referred to in the letter of 7 December 2000 referred to both plaintiffs.

(6) The letter was published.

G **[10]** On the other hand, from the evidence adduced by the plaintiffs, the following facts were established without any doubt:

(1) The 1st plaintiff was the Convenor of the Darts Section of the Royal Lake Club Kuala Lumpur (RLC) whilst the 2nd plaintiff was a member of the Darts Sub-Committee. H

(2) The defendants who are members of the RLC were also members of the Darts Section of the RLC wrote the letter of 7 February 2000 (hereinafter referred to as "the letter").

I (3) The Darts Section gets an annual sum from the RLC Account whilst all members of the Darts Section pay RM5 per month into what is called the Darts Section Fund.

(4) The Dart Section organises and finances its own activities.

(5) It is a policy of the RLC that the General Committee Members and Sub-Committee Members of the RLC cannot charge to the Club Account for any alcohol consumed for any meeting, function or event. This is established by the evidence of PW4 (Rahim Ismail, a former President of the RLC), PW5 (Satwant Singh, a former Manager for Sports & Recreation of the RLC) and PW6 (Gasper Gnanamuthu, a former Chairman of the Darts Section of the RLC and now Vice President of the Club).

(6) Both the 1st and the 2nd plaintiffs had charged alcohol to the Darts Section Account as evidenced by the following exhibits:

(a) 1st plaintiff – p. 225 of Bundle B – Famous GR. 75 GR RM123.38

– p. 231 of Bundle B – Famous GR. 75 GR RM144.38

(b) 2nd plaintiff – p. 226 of Bundle B – B Carlsberg DRF RM16.06

– p. 227 of Bundle B – B Carlsberg DRF RM18.06

– p. 228 of Bundle B – B Carlsberg DRF RM20.16

– p. 230 of Bundle B – B Carlsberg DRF RM33.10

(7) The special meeting of the Indoor Recreational Sub-Committee held on 29 September 2002 reimbursed the sum of RM242.44 to P1, P2 and P3 for "chits signed during the Working Committee meetings for the Invitational Tournament."

(8) The details on what the RM242.44 was signed for is evidenced by document at p. 182 of exh. B and the break down for the amount is as follows:

A (a) 1st Plaintiff – RM86.93

(b) 2nd Plaintiff– RM11.13 RM242.44

(c) 3rd Plaintiff – RM144.38

B The amount was charged for Carlsberg beer, wine and whisky (Famous Grouse).

(9) As a result of the letter of 7 December 2000 by the defendants the three plaintiffs were faced with disciplinary C action. Both the 1st and 2nd plaintiffs were suspended as member of the RLC from 28 December 2001 until 27 March 2002.

(10) The General Committee of the RLC had published a notice (ID-1) that "The club will expunge from the records relating D to and concerning the said suspension" as "The club acknowledge that procedural irregularities in the disciplinary proceedings that resulted in the suspension of the two members;" (the members here refers to the 1st and 2nd plaintiffs).

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(11) The decision of the General Committee to expunge the records was to clear all actions taken "against the Club", the plaintiffs having sued the club for the wrongful suspension. This is from the evidence of PW3 (Manjeet Singh Dhillon) F who was the President of the RLC who had initiated to look into actions against the RLC and determine how best the cases could be resolved.

(12) The said notice had no contents of apology.

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(13) Both the 1st and 2nd plaintiffs admitted by their own testimonies that not only members of the Darts Section but members of the RLC generally should have a right to be concerned about any improprieties.

H **[11]** The facts listed above were established through the plaintiffs' own witnesses. Though the 1st and 2nd plaintiffs gave evidence in great length, to my mind the facts that are established and listed above are the only relevant ones.

I **[12]** Mohamed Dzaiddin J in *Ayob bin Saud v T.S. Sambanathamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 said:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) **the words are defamatory;** (2) **the words refer to the plaintiff;** and (3) **the words were published.** When a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: *Rajagopal v. Rajan*. (emphasis added)

[13] As the parties had agreed that the words referred to the plaintiffs and they were published, I would only have to determine whether the words in the letter are defamatory.

[14] As such it is left to be determined whether the publication was defamatory.

[15] To establish whether the words are defamatory or not, the plaintiffs must show what the ordinary and reasonable man in the street would construe the words to mean. In this case, to a reasonable person reading the letter, there is no doubt that it indicated improprieties on the part of the plaintiffs in executing their functions as the Convenor and a Sub-Committee member of the Darts Section of the RLC signing alcohol to the Darts Section Fund and taking coupons in numbers more than their entitlement.

[16] There is also no doubt that the word "beverages" in para. 1.0 of the letter refers to alcohol as it is known to the club members that no General Committee members or Sub-Committee members can charge alcohol to the Club or the Darts Section Fund for any event, occasion or meetings as monies in these coffers "belong to the members".

[17] The plaintiffs tried very hard to convince the court that their action of signing liquor to the Darts Section Fund was in order by stating that:

(1) the special Meeting of the Sports & Recreational Sub-Committee held on 29 February 2002 had vindicated them and "legalise" their actions;

(2) the purpose of the signing to the Darts Section was to "entertain" the sponsors or would be sponsors for the Merdeka Tournament Darts Competition;

(3) the 1st plaintiff does not drink whisky though he had taken such and signed to the Darts Section Fund; and

(4) the RLC had cause to be published a notice expunging from the records of the RLC matters pertaining to the 1st and 2nd plaintiffs' disciplinary proceedings.

[18] The Special Meeting may have decided to reimburse the 1st and 2nd plaintiffs, the purpose of "consumption of the liquor" may be to entertain sponsors or prospective sponsors, the 1st plaintiff may not take whisky at all and the said notice may have been published but, all these are irrelevant. The 1st and 2nd plaintiffs had breached the RLC rule as Convenor and Sub-Committee Member of the Darts Section by signing liquor to the Darts Section Fund. I agree with the defendants' submission that both the plaintiffs had "abused their trusteeships as office bearers" by charging alcohol to the RLC in due breach of the RLC's policy.

[19] Indeed, the words are defamatory in relation to the 1st and 2nd plaintiffs. By what Gopal Sri Ram JCA said in the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor (supra)*, the fact that the defendants did not call witness and elected to submit no case to answer, strengthened the plaintiffs' case that the words were defamatory in respect of the plaintiffs.

[20] Since the defendants had elected to submit on no case to answer and elected as such, I have to rely on the evidence adduced in the cross-examination and the submission of the defence counsel to determine if the defences of justification and qualified privilege are made out.

Justification

[21] For the defence of justification and qualified privilege to succeed the defendants must show that the defamatory words are true bearing in mind s. 8 of the Defamation Act 1957.

[22] In this case the defendants have proven the facts alleged in the letter. There are clear evidences that the two plaintiffs signed for alcohol to the Darts Section Fund, an action that is forbidden by the Club rules. There is also ample evidence that the 2nd plaintiff had taken more coupons for drinks than he is allowed.

Qualified Privilege

[23] Since the defence of justification has been made out by the defendants then the letter can be said to have been published on an occasion of qualified privilege. The defendants as members of the Club had the right to be concerned with the actions of the 1st and 2nd plaintiffs as they pay RM5 per month to the Darts Section Fund and the Darts Section not only has this money, but also gets a certain amount annually from RLC fund which is in fact derived from all members club. Therefore the defendant who is not a member of the Darts Section also had a right to be concerned. The defendants had a moral, social and legal duty to be concerned about the improprieties and rectify the deficiency and to discipline office bearers who had breached the rules of the RLC. Thomson LP in *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 78 said:

> As was said by Lord Atkinson in the case of *Adam & Ward:*
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> A privileged occasion is, in defence to a qualified privilege an occasion – where the person who makes a communication has an interest or a duty or social or moral, to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.

[24] I agree with the submission of the learned counsel for the defendants that the Club's Bye Laws provides for two classes of complaint ie:

(1) Paragraph 18.2 of the Constitution of the RLC provides for a remedial complaint in order to rectify fault or irregularity and it states:

> Any complaint concerning the conduct of any whether should be in writing and shall in the first place be made to the Chairman of the Investigating Chairman; and

(2) Paragraph 4.3.6 of the Darts Section Bye Laws provides for punitive remedies against a wrong doer and it states:

> 4.3.6. The Darts Convenor in contribution with the Darts Sub-Committee shall – 4.3.6. deal with and resolve any complaints that may arise from time to time.

[25] However, since the complaint is against the Convenor (1st plaintiff) and a Sub-Committee Member (2nd plaintiff) it is logical that it could not have been made under Bye Law 4.3.6. Hence it is acceptable that it was addressed to the Chairman of the Darts Section RLC.

[26] This fact could not negate that the letter is qualified privilege.

[27] Taking the evidence in the case as a whole and on the balance of probabilities, the defendants had proven and made out the defence of justification and qualified privilege.

[28] In fact I would venture to say that it was through the plaintiffs themselves and their own witnesses that the defences of justification and qualified privilege were made out. They together destroyed the plaintiffs' case. I was indeed not surprised that the defendants elected to submit as to no case to answer.

[29] The plaintiff in this reply to the defendants' statement of defence had raised "malice" to negate the defence of justification and qualified privilege. However, during the course of the trial not an iota of evidence was led to prove malice. The plaintiffs appeared to have overlooked this plea of theirs but went on to assert that the defendants knew of the notice (ID-1) and therefore should have known and ascertained the facts before publishing the letter. Therefore I rule that the plea of malice must fail.

[30] In all the circumstances I would therefore dismiss the plaintiffs' claim with cost.

[31] I must make a note here the plaintiffs' claim for damages for an amount of RM3 million. After all the 8 witnesses had given evidence I do not find any that has gone to prove that their reputation was injured and they suffered humiliation and ought to be compensated to the tune of RM3 million or any amount at all.